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No. 90-502

Supreme Court, U.S.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

TOM PERDUE,  
*Petitioner,*

v.

J. MAC BARBER,  
*Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI  
TO THE GEORGIA COURT OF APPEALS

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## STATEMENT OF THE CASE

Many of the factual errors contained in the Petition for Certiorari are described in the Argument, below.

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## SUMMARY OF THE ARGUMENT

The record in this case presents material fact disputes which require a jury trial of the issue of "actual malice." From the evidence of record, a jury may find by clear and convincing evidence that Petitioner Perdue stated false and defamatory facts with knowledge of their falsity or with reckless disregard of their falsity.

The issues which Petitioner frames, and as to which certiorari is requested, are neither fairly presented by this record, nor suitable for certiorari if presented.

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## ARGUMENT

J. Mac Barber, respondent herein, respectfully opposes the requested writ of certiorari in this case.

With respect, the Petition for Certiorari describes a very different case from the one presented. Petitioner

Perdue's letter uttered false statements of fact which Perdue knew to be false, or whose falsity Perdue recklessly disregarded, and the decision of the Court of Appeals permitting this defamation case to be tried by a jury was correct.

The Petition for Certiorari carefully avoids telling this Honorable Court what Perdue said, preferring for this Court to believe that Perdue expressed only some innocuous opinion "that Barber had taken what amounted to a bribe . . ."

But this Court should note the following fact sentence in Perdue's carefully crafted defamatory letter -- which was sent on the eve of the election to county commissioners, mayors, and many others throughout Georgia:

"The trucking company official who gave Mac Barber the money was convicted and fined a total of \$12,000.00!"

This statement is crafted skillfully to imply that the trucking company official was convicted of bribing Mac Barber -- and that intentional implication was false. The conviction of the trucker was for attempting to bribe, not Mac Barber, but a different commissioner.<sup>1/</sup> Barber was never accused of a crime, and the trucker was never charged with a crime involving Barber. In

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<sup>1/</sup> It is undisputed that Perdue knew the truckers were being investigated for making or attempting to make contributions to other commissioners than Mac Barber.

- addition, the trucker had pleaded nolo. (There were two truckers. The other trucker, also not charged with any crime involving Barber, was nolle prosequi 'd.)

This false sentence was vital to Perdue's defamatory letter, because it sought to add the appearance of "hard fact" and even the appearance of a stamp of judicial approval to Perdue's letter's false claim that Mac Barber took a bribe.

Nowhere in this record has Perdue ever claimed to believe his letter's intentional, false and defamatory implication that the trucker was convicted of bribing Barber. Thus Perdue makes no claim that the falsehood was innocent. Therefore, Perdue has never even made out a prima facie case of constitutional privilege entitling him to summary judgment.

But even if Perdue had made out a prima facie case of privilege, Mac Barber has proved Perdue's "actual malice" by "clear and convincing" evidence and is therefore definitely entitled to a jury trial.

First, there were no facts which could have supported a belief that anyone was convicted of bribing Mac Barber. Perdue has never pointed to any such facts, and his Petition for Certiorari is studiously silent on the point.

Second, and extremely importantly, Perdue tried not to learn the truth: he did not care enough about the truth to ask the Attorney General whom the trucker was convicted of bribing.

Here is Perdue's deposition testimony on this point:

"Q. Listen to my question carefully. Did you ask Mr. Bowers if this plea of nolo contendere with reference to one of the trucking officials had anything to do with allegations of bribery of Mac Barber or was it someone else?

"A. I did not ask that question specifically because the file, the investigation was all inclusive . . .

\* \* \* \*

"Q. Did he tell you what offense he pled to? You must have wanted to know.

"A. He did not tell me what offense that he pled to.

"Q. Did you ask him what offense he pled to, whether it was referenced to alleged bribery to Mac Barber or alleged bribery to Bobby Pafford or to John Brown or to whom?

"A. No, sir. I did not ask that specific question."

\* \* \* \*

"Q. Why didn't you ask? Why didn't you ask what he pled to?

"A. I did. He pled nolo contendere.



"Q. To what?

"A. To bribery.

"Q. To bribing who?

"A. I can't answer that."

[Perdue depo., pp. 66-68, Supp. R-70-72.]

Thus, Perdue knowingly implied that the trucker was convicted of bribing Barber, and knew that he had no support for the implication.

A jury may therefore conclude, quite simply, and out of Perdue's own admissions, that Perdue fabricated this charge. Fabrication, of course, is the purest form of "actual malice." As this Court has stated: "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant . . ." St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

Any reasonable fact-finder must conclude that, even construed most generously to Perdue, Perdue's admitted failure to ask Attorney General Bowers whom the trucker was convicted of bribing, was reckless disregard for the truth. Whether Perdue fabricated this sentence, or whether he was only reckless in this sentence, is for a jury. Both are "actual malice."



And any reasonable fact-finder must also conclude that Perdue's failure to ask the key question of Attorney General Bowers was, given the clear implication in Perdue's sentence, the "purposeful avoidance of the truth," which is "actual malice" according to Harte-Hanks Communications, Inc. v. Connaughton, \_\_\_\_ U.S. \_\_\_\_, 109 S. Ct. 2678, 2698 (1989).

Contrary to the Petition for Certiorari, Attorney General Bowers has sworn that he did not approve this sentence, and agreed it was false.

Thus, Mac Barber is plainly entitled to a jury trial of his libel suit, and the Georgia Court of Appeals was correct.

Also contrary to the Petition for Certiorari, the Court of Appeals' majority carefully applied the correct standards for determining whether a triable issue of "actual malice" existed.

Perdue's Petition is also wrong in contending there was simply a negligent failure to investigate, and in contending that the key facts are undisputed.

Indeed, material fact disputes pervade this record, and make summary judgment completely unthinkable.

While the Petition for Certiorari declares that it is undisputed that Attorney General Bowers stated in Perdue's presence that "the evidence against Barber was strong, and that a conviction was likely," and that "Perdue never heard . . . Attorney General Bowers . . .

express any doubt as to [the] opinion that Barber had taken a bribe," these statements are not correct. The fact is that Attorney General Bowers expressed, and Deputy Assistant Attorney General Kohler recalled, very serious doubts expressed in the meeting with Perdue about whether Barber had either the "mental state" or the "criminal intent" to commit bribery. There was also serious doubt expressed in the same meeting about whether there was a "quid pro quo" or anything done by Barber in return for the small campaign contribution from the trucker.

Indeed, also contrary to the Petition for Certiorari, Attorney General Bowers never held the "opinion that Barber had taken a bribe . . ." Whether Barber was guilty was an extremely "difficult" question over which the Attorney General "agonized" more than "anything . . . in my life." These doubts were shared with Perdue -- contrary to the Petition for Certiorari. Perdue's phrase at page 6 of the Petition for Certiorari: "their opinion that Barber had taken a bribe," referring to the Attorney General and others, is a complete invention and contrary to fact.

What petitioner includes in his Petition for Certiorari as a statement of "undisputed" facts is in reality a paraphrase of Mr. Perdue's own conclusory affidavit, which in fact is materially disputed in numerous respects throughout the record. Those fact disputes must be tried.

It is of course not Barber's burden to prove Perdue's disregard for the truth out of Perdue's own mouth. As this Court ruled in St. Amant v. Thompson, 390 U.S. 727, 732:

"The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

See also, Hunt v. Liberty Lobby, 720 F.2d 631, 645 (11th Cir. 1983): "[A]n inference of actual malice can be drawn when a defendant publishes a defamatory statement that contradicts information known to him, even when the defendant testifies that he believed that the statement was not defamatory and was consistent with the facts within his knowledge." "[A] publisher cannot feign ignorance or profess good faith when there are clear indications which bring into question the truth or falsity of defamatory statements." Id. at 644, quoting, Gertz v. Robert Welch, Inc., 680 F.2d 527, 538 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983) (appeal after retrial following remand by Supreme Court).

There is one more proven fact in this record of which this Court may wish to note. Perdue admits that he decided to attack Mac Barber's integrity in his letter before he attempted to learn any facts or details in the GBI file! Thus the facts didn't matter to Perdue: he

was trying to support a predetermined hypothesis whether it was true or not. And Perdue admits he was trying to cost Mac Barber the election. This state of mind is the motive supporting a finding of "actual malice," as it explains Perdue's willingness to falsify. Gertz, supra (defendant conceived of story line before investigating and tried to make evidence conform); Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir. 1981), cert. denied, 454 U.S. 964 (1981); Coughlin v. Westinghouse Broadcasting and Cable, Inc., 603 F. Supp. 377, 385 (E.D. Pa. 1985), cert. denied, 476 U.S. 1187 (1986).

In this case, the need for a jury trial is clear, and the Georgia Court of Appeals was correct. Fact disputes are abundant, and a jury may justifiably decide to reject all of Perdue's testimony given the many witnesses who have sworn to facts which contradict Perdue, given the circumstances in which the remarks were made, and given Perdue's admitted motive to attack Barber's integrity.

The case does not fairly present the issues described in the Petition for Certiorari, it is ripe for trial, not summary judgment, and the Petition for Certiorari should be denied.

The issues of law framed by the Petition for Certiorari are not fairly raised in this record, and do not seem worthy of this Court's attention even if they had been fairly raised here. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) may or may not be binding in the state courts, but here the Georgia Court of Appeals' majority felt bound by Anderson and faithfully applied it.

And the difference of opinion among the judges in the Georgia Court of Appeals surely had nothing to do with Anderson -- which the dissenters did not even cite. If Anderson is difficult to apply, or if there are "unanswered questions" about Anderson, this Court's remedy should best await a record -- unlike this one -- on which those concerns are voiced by the court or otherwise vividly apparent.

Nor are the other posited bases good reasons for granting the writ of certiorari in this case. The Petition for Certiorari attempts at pages 12-14 to set forth twelve examples of the Georgia Court of Appeals' "distortion" of "substantive constitutional principles." Many of these "examples" stress that Perdue was guilty only of "failure to investigate" and Perdue's Petition suggests that that standard was "repudiated" in St. Amant, supra. But the Georgia Court nowhere ruled that Perdue's "failure to investigate" was sufficient alone to constitute actual malice. And this Court's statement in Harte-Hanks, supra, is applicable here:

"Although failure to investigate will not alone support a finding of actual malice, see St. Amant 390 U.S. at 731, 733, 88 S.Ct., at 1325, 1326, the purposeful avoidance of the truth is in a different category."

\_\_\_\_ U.S. \_\_\_\_\_, 109 S. Ct. 2678, 2698. (1989). Taken in context, the Georgia Court of Appeals' remarks to which Perdue objects fairly characterize the facts and circumstances giving rise to a jury issue of "actual malice," and correctly apply governing principles of law.

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## CONCLUSION

With respect, therefore, Respondent Barber submits that this case not yet tried, and this record of material fact disputes, present no issue which is appropriate or ripe for this Court's review by writ of certiorari.

Respectfully submitted,

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